

IN THE  
**Supreme Court of the United States**  
October Term, 1982

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**No. 82-1267**

UNITED STATES OF AMERICA ex rel.  
GERALD JEROME ROCK,

*Petitioner,*

—against—

PHILLIP COOMBE, JR., Superintendent,  
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**RESPONDENT'S BRIEF IN OPPOSITION**

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**Question Presented**

Whether the trial court's charge as a whole, which explained how to find intent and repeatedly instructed on the prosecution's burden to prove every element of the crime beyond a reasonable doubt, shifted the burden of proof to petitioner in violation of this Court's holding in *Sandstrom v. Montana*, 442 U.S. 510 (1979)?

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**RESPONDENT'S BRIEF IN OPPOSITION**

The respondent Phillip Coombe, Superintendent of the Eastern Correctional Facility, Napanoch, New York, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Second Circuit's judgment in this case.

The Second Circuit affirmed a judgment of the United States District Court for the Eastern District of New York, dismissing petitioner's petition for a writ of *habeas corpus*. Petitioner is currently incarcerated pursuant to a judgment of the New York State Supreme Court, Kings County, convicting him of Murder and sentencing him to a term of imprisonment of twenty years to life.

### **Opinions Below**

The opinions of the Court of Appeals and District Court are not yet reported, and are reproduced in Petitioner's Appendix.

### **Jurisdiction**

The judgment of the Court of Appeals for the Second Circuit was entered on December 2, 1982. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### **Statement of the Case**

Petitioner Gerald Jerome Rock was convicted on September 25, 1975, after a jury trial, of Murder [New York Penal Law § 125.25]. This charge arose out of an incident in which petitioner, acting with seven other teenagers, attacked one James Gibbs, Jr., after Gibbs ignored petitioner's request for a match. Four of the teenagers all testified that petitioner repeatedly pounded Gibbs' head with a hammer, while one of the other teenagers stabbed Gibbs with a knife. The medical examiner testified that Gibbs died as a result of a stab wound to the heart and massive injuries to the face and skull.

Petitioner's defense was to contend that he had not participated in the attack. He so testified, and called as a witness his cousin, already imprisoned for the murder, who testified that he, rather than petitioner, had hit Gibbs with the hammer.

### **The Court's Charge and Jury Questions**

The trial court opened its charge to the jury by explaining that the jury is the exclusive judge of the facts and that, in judging the facts, they must determine whether

the People have met their burden of proving petitioner guilty beyond a reasonable doubt. Before reading the indictment, the court instructed:

The defendant is presumed to be innocent, and that means that the burden of proving his guilt rests at all times upon the prosecution, and that burden of proof is by proof beyond a reasonable doubt . . . .

The court then defined homicide and instructed the jury on the elements of murder.

As part of its explanation of homicide, the court stated:

There may indeed be a death and it maybe [sic] caused by some conduct of the defendant; yet it may not be a homicide, and the defendant maybe [sic] innocent of any crime.

It is therefore your duty to examine not only the fact of the killing and of the death, but also the circumstances surrounding it before you can determine whether or not the defendant is guilty of the crime presented to you for your consideration.

The court stated that intent was a necessary element of the crime which may be "ascertained from [a person's] conduct or speech or from a combination of both." The court went on to charge:

It is a fundamental rule of evidence that a man is presumed to intend the natural consequences of his act, unless the act is done under circumstances or under conditions which preclude the existence of such an intent.\*

If you conclude that the defendant committed the acts charged, then you must decide whether

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\* It is this statement to which petitioner now objects.

or not from all of the established facts, speech, conduct and actions by the defendant, he intended to effect the commission of this crime.

\* \* \* \* \*

[W]hether an intent to kill was formed is something you must determine from all of the circumstances of this case . . . .

[Y]ou must be convinced [sic] by proof beyond a reasonable doubt that intent to kill did exist at the time the fatal striking, hitting and beating occurred.

The court concluded its specific charge on intent by stating:

To find that the defendant had such intention you must be convinced beyond a reasonable doubt that it was his conscious objective to cause death and that the act or acts resulted from this conscious objective.\*

Throughout the remainder of the charge, the court continued to instruct that the People have the burden of proving every element beyond a reasonable doubt and that petitioner was presumed innocent.

Just before the jury retired to deliberate, the court again instructed the jury:

[D]id the District Attorney by credible evidence establish the guilt of this defendant to your satis-

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\* The court also instructed the jury on the lesser offense of Manslaughter in the First Degree, which requires an intent to cause serious physical injury and not the intent to kill required for murder. Both in its initial instruction and in a subsequent instruction pursuant to a jury request to explain intent, the court, in distinguishing the two counts, informed the jury that intent was an element of both counts and the burden was on the People to prove the requisite intent beyond a reasonable doubt.

faction beyond a reasonable doubt[?] That is the District Attorney's burden. The defendant again is presumed to be innocent.

At the end of the court's charge, defense counsel stated:

The first thing I would like to do is to compliment Your Honor on what I consider to be a fair and decent and objective charge.

None of defense counsel's three requests to charge concerned the issue of intent. No objection was made to any part of the court's charge.

During deliberations, the jury twice requested a reading of the court's charge on intent. Each time, in addition to stating the now challenged instruction, the court repeated that the jury was to determine intent from the surrounding circumstances and from petitioner's speech, conduct and actions. The first time, the court called the jury back to remind them that the People must prove intent beyond a reasonable doubt. Petitioner made no objection to the re-readings of these instructions or to the instructions themselves.

### **The Verdict and Sentence**

On July 15, 1975, the jury found petitioner guilty of Murder. On September 25, 1975, petitioner was sentenced to a term of imprisonment of from twenty years to life.

### **Post-Conviction State Court Proceedings**

On appeal to the Appellate Division, Second Department, petitioner did not raise any issue concerning the trial court's charge on intent. The Appellate Division unanimously affirmed the judgment of conviction, without opinion, on June 28, 1976, *People v. Rock*, 53 A.D.2d 703 (2d Dept. 1976), and petitioner's application for leave

to appeal was dismissed for untimeliness by the Court of Appeals on September 17, 1976.

Five years after his conviction, on April 24, 1980, petitioner moved to vacate the judgment of conviction pursuant to New York Criminal Procedure Law § 440.10. For the first time, petitioner claimed that the trial court's charge on intent shifted the burden of proof to him in violation of the rule of *Sandstrom v. Montana*, 442 U.S. 510 (1979). Specifically, petitioner objected to the following phrase, particularly the italicized portion:

It is a fundamental rule of evidence that a man is presumed to intend the natural consequences of his act, unless the act is done *under circumstances or under conditions which preclude the existence of such an intent.*

Petitioner's motion was denied on the merits on May 19, 1980, and leave to appeal was denied by the Appellate Division on June 21, 1980.

### **The Federal Court Proceedings**

On November 30, 1981, petitioner filed a petition for a writ of *habeas corpus* in the United States District Court for the Eastern District of New York, asserting, *inter alia*, that the trial court's charge shifted to petitioner the burden of proof on intent. On May 3, 1982, that court, addressing only the *Sandstrom* claim, found that the charge as a whole correctly stated the People's burden, and furthermore because there was no real issue of intent at trial, any error in the intent instruction was harmless beyond a reasonable doubt. The court dismissed the petition but nevertheless granted a certificate of probable cause.

On December 2, 1982, the United States Court of Appeals for the Second Circuit affirmed the holding of

the District Court, holding that the trial court's intent charge, as articulated in both the main and supplemental charges, did not shift the burden of proof to the petitioner.

### **Reasons Why The Writ Should Be Denied**

#### **1. Neither the Decision Below Nor the Record Raises the Question of Harmless Error Presented by Petitioner.**

The court of appeals did not reach the question of harmless error presented by petitioner, because it concluded that the charge as a whole was constitutional under *Sandstrom v. Montana*, 442 U.S. 510 (1979). This Court, and lower courts, have looked to the charge as a whole, rather than to isolated phrases or sentences in evaluating a claim of *Sandstrom* error. See, e.g., *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); *Nelson v. Scully*, 672 F.2d 266 (2d Cir.), cert. denied, 102 S.Ct. 2301 (1982); *Pigee v. Israel*, 670 F.2d 690 (7th Cir. 1981), cert. denied, 103 S.Ct. 103 (1982); *United States v. Tecumseh*, 630 F.2d 749 (10th Cir. 1980), cert. denied, 449 U.S. 961 (1981). In *Connecticut v. Johnson*, 51 U.S.L.W. 4175 (U.S. Feb. 23, 1983), this Court recently reaffirmed this approach, noting that the Connecticut Supreme Court had analyzed the charge as a whole in that case, and on this basis had found the charge as a whole unconstitutional. In *Johnson* the State did not challenge that finding in the United States Supreme Court, and therefore the only issue before this Court was harmless error. *Id.* at 4177 n.10. In the instant case, however, the Court of Appeals for the Second Circuit properly analyzed the charge as a whole and found no error at all. Thus, this case presents simply an instance of evaluating the language of an entire charge, in accordance with *Sandstrom*, and not any question whatsoever of harmless error.

Even if there were an issue of harmless error in this case, petitioner's claim would be without merit. In

*Connecticut v. Johnson*, 51 U.S.L.W. at 4178-79, this Court made it clear that a *Sandstrom* error may be harmless if, as here, there is no factual dispute at trial over the issue of intent.\* Although petitioner now claims that intent was an important issue in this case, at no time did petitioner contend as part of his trial strategy that he participated in the killing of Gibbs, but lacked the intent to kill. In fact, defense counsel specifically stated on summation, "Our defense is we had nothing to do with it." Indeed, it would have been inconceivable to argue that the person who brutally and repeatedly hammered Gibbs to death intended merely to inflict serious injury and did not intend to kill. This case thus falls within the harmless error exception recognized by *Connecticut v. Johnson*, and routinely applied by the lower courts. *Mancuso v. Harris*, 677 F.2d 206 (2d Cir.), cert. denied, 103 S.Ct. 382 (1982); *Rivera v. Coombe*, 683 F.2d 697 (2d Cir. 1982); *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981), petition for cert. filed, 51 U.S.L.W. 3022 (U.S. Jan. 22, 1982) (No. 81-1392); *McGuin v. Christ*, 657 F.2d 1107 (9th Cir. 1981), cert. denied, 455 U.S. 990 (1982).

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\* While the court of appeals rejected the harmless error analysis, that determination was, of course, dictum because that court found no error at all. Furthermore, the court of appeals was inconsistent and incorrect in suggesting that although the defense raised no issue of intent whatsoever, nevertheless intent was in issue merely because the trial court instructed the jury on the lesser included offense of manslaughter and because the jury asked questions about the court's charge on intent. Pet. App. at 21a, n.7.

## 2. The Court Below Correctly Applied Settled Principles of Law in Analyzing the Jury Charge in this Case, and Did Not Decide Any Question of Law Worthy of this Court's Review.

It is well-settled that in evaluating a claim of *Sandstrom* error, a court should analyze the trial court's charge in its entirety, rather than focus on isolated phrases. *Connecticut v. Johnson*, 51 U.S.L.W. at 4177. *Cupp v. Naughten*, 414 U.S. at 146-47; *Nelson v. Scully*, 672 F.2d at 271-72. The court of appeals was thus applying settled principles of law when it analyzed the charge as a whole in this case, and found that the charge was constitutionally sound. This case is utterly unlike *Sandstrom v. Montana*, which involved a one-sentence unqualified charge on intent in a case where the sole issue was intent, and *Connecticut v. Johnson*, in which the court, without further explanation, twice informed the jury of a "conclusive presumption." The charge here was elaborately explained and qualified, and could not have been interpreted by a reasonable juror as shifting the burden of proof to petitioner.

The court of appeals analyzed the intent charge as a whole, in accordance with this Court's recent holding in *Connecticut v. Johnson*.\* Its analysis was correct, and

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\* This Court specifically noted in *Johnson* that the Connecticut Supreme Court analyzed the trial court's charge as a whole, "[i]n accordance with *Sandstrom*." *Connecticut v. Johnson*, 51 U.S.L.W. at 4177. Thus, if *Sandstrom v. Montana*, *supra*, were not already dispositive of petitioner's claim, *Connecticut v. Johnson*, in approving the Connecticut court's mode of analysis, dispels all doubt as to whether an alleged *Sandstrom* error may be examined in light of the balance of the charge. *Johnson*, therefore, resolves any purported conflict among the circuits concerning the application of *Sandstrom*. Compare, e.g., *Dietz v. Solem*, 640 F.2d 126 (8th Cir. 1981) and *Tyler v. Phelps*, 643 F.2d 1095 (5th Cir. 1981), cert. denied, 102 S.Ct. 1992 (1982) with *Pigee v. Israel*, *supra* and *United States v. Tecumseh*, *supra*.

presents no issue worthy of review by this Court. As the court of appeals held, "whenever the presumption language was used, whether in the main charge or the supplemental charges, it was in the midst of a balanced statement that intent was to be determined from conduct, speech, and all of the circumstances." Pet. App. at 21a-22a.\* Furthermore, on each occasion, the challenged instruction was immediately followed by the qualifying language "unless the act is done under circumstances or under conditions which preclude the existence of such an intent." Pet. App. at 19a. The court also specifically informed the jury that although a death might be caused by a defendant, "it may not be a homicide and the defendant may be innocent of any crime," and instructed the jury that the People have the burden of proving beyond a reasonable doubt the presence of the "specific intention" for both manslaughter and murder. Additionally, the general language of the trial court's charge repeatedly instructed that the prosecution always retained the burden of proof beyond a reasonable doubt and that petitioner was presumed innocent. Finally, the court ended each set of instructions on intent "impeccably." Pet. App. at 23a. Thus, the court of appeals, in looking to the balance of both the specific charge on intent and the charge as a whole, correctly found the challenged instructions did not shift the burden of proof.\*\*

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\* Petitioner's claim that the supplemental charges compounded any error is without merit since the supplemental charges themselves did not shift the burden of proof.

\*\* The instant case is thus distinguishable from *Ramirez v. Jones*, 683 F.2d 712 (2d Cir. 1981), *petition for cert. filed*, 51 U.S.L.W. 3305 (U.S. Oct. 1, 1982) (No. 82-584) cited by petitioner, where the trial court twice charged the mandatory presumption and, instead of curing the error by the balance of the charge, exacerbated the error by charging that intent's "physical manifestation [is] the accomplishment of the thing determined upon. One's mind is compelled from necessity to refer to the act and

[Footnote continued on following page]

This case presents no issue worthy of this Court's review.

### **CONCLUSION**

**For these reasons, the petition for a writ of certiorari should be denied.**

Dated: Brooklyn, New York  
March, 1983

Respectfully submitted,

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physical manifestations of the intent exhibited by the results produced is the safest, if not the only, proof of the fact to be ascertained." *Id.* at 715. Furthermore, in *Ramirez*, intent was the crucial issue, unlike the case at bar. *See discussion, Point I, supra.*